

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1249

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

BARTHOLOMEW BUIGUES, ANGELO PUIG,
IRMA ANES, SUSAN HOROWITZ and
JOHN SAMMARCO,

Defendants-Appellants.
-----X

*B
Pys*
Docket No. 77-1249
77-1252
77-1253

BRIEF FOR APPELLANT SUSAN HOROWITZ



DUNNINGTON, B. HOLOW & MILLER
161 EAST 42ND STREET
NEW YORK, N. Y. 10017

INDEX

	<u>Page</u>
Authorities cited.	ii
Preliminary Statement.	1
Statement of Facts	3
Question Presented	13

Argument

POINT I

The evidence was insufficient to convict Miss Horowitz	14
---	----

POINT II

There is no evidence that Miss Horowitz made any claim that was intended to be used to obtain reimbursement from the Government .	21
---	----

CONCLUSION	24
----------------------	----

AUTHORITIES CITED

<u>Cases:</u>	<u>Page</u>
<u>Ebeling v. United States</u> 248 F. 2d 429, 435 <u>cert. denied</u> , <u>sub nom.</u>	14, 15, 16, 19 21, 22, 23
<u>Emerling v. United States</u> 355 U.S. 907 78 S. Ct. 334, 2 L. Ed. 2d 261 (1957).	15
<u>Glasser v. United States</u> 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed 680 (1942)	16
<u>Lowe v. United States</u> 141 F.2d 1005 (5th Cir.1944)	21, 22, 24
<u>United States v. Beasley</u> 550 F.2d 261 (5th Cir.1977)	21, 23, 24
<u>United States v. Candella</u> 487 F.2d 1223 (2nd Cir.1973) <u>cert. denied</u> 415 U.S. 977, 94 S. Ct. 1563, 39 L. Ed. 2nd 872 (1974)	15, 21, 22, 23, 24
<u>United States v. Feola</u> 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).	22
<u>U.S. v. Catena</u> , 500 F.2d 1319 (3rd Cir. 1974)	14, 15, 24

Statutes:

18 United States Code §2	14, 20, 21
18 United States Code §287.	14, 20, 21
18 United States Code §371.	14, 15, 20
18 United States Code §1001	15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee Docket No. 77-1249
:
-v- 77-1252
77-1253
:
BARTHOLOMEW BUIGUES, ANGELO PUIG,
IRMA ANES, SUSAN HOROWITZ and
JOHN SAMMARCO,
:
Defendants-Appellants.
:
-----X

BRIEF FOR APPELLANT SUSAN HOROWITZ

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York. Appellant Susan Horowitz and four others were convicted in December, 1976 following a jury trial before the Honorable Milton Pollack.

The indictment contained three counts against Susan Horowitz and the other four defendants.

The first count charged all the defendants with conspiracy to defraud the United States, in violation of 18 U.S.C. §371, by causing the United States Department of Agriculture ("USDA") to reimburse a corporation, Youth In Government, for

work supposedly performed by certain of its employees in the 1975 Special Food Services Program ("Summer Lunch Program") when in fact such employees performed little or no work, in violation of 18 U.S.C. §287. The means by which Susan Horowitz was alleged to have carried out the conspiracy was to work full time for another corporation and to fail to report regularly to her job with the Summer Lunch Program.

Counts two and three alleged that all the defendants unlawfully made and presented, and caused to be made and presented, to the USDA, false claims against the United States covering the periods July, 1975 (Count two) and August, 1975 (Count three) in violation of 18 U.S.C. §287 and §2.

Susan Horowitz plead not guilty to all three counts.

After trial held on November 29 through December 6, 1976, Susan Horowitz was convicted of all three counts charged against her (1245, 1246)* as were all the other defendants.

On January 17, 1977 Judge Pollack ordered that the imposition sentence of imprisonment be suspended, placed Miss Horowitz on probation for a period of one year on each of the counts to run concurrently and imposed a fine of \$1,000 to cover all of the counts (Record, Document no. 16).

Susan Horowitz filed a Notice of Appeal on January 17, 1977 (Record, Document no. 25).

*The numbers in parentheses refer to the pages of the transcript contained in the record before this court.

STATEMENT OF FACTS

Background

Youth In Government, a non-profit corporation, run by defendants Buigues and Puig, decided to become a "sponsor" of the Summer Lunch Program in 1975 in New York City. The function of a "sponsor" was to locate sites where children could be served lunches and enlist the aid of organizations which would provide the personnel to serve the lunches. Once the sponsors' sites were approved by the USDA, the sponsor was to hire a vendor to provide the lunches and then to monitor the vendor and the sites to see that the lunches were properly prepared and served to children (1070).

Youth In Government applied to the USDA for authority to serve 63 sites (790). However, due to conflicts with other sponsors, Youth In Government was approved only 42 or 43 (250, 790, 792).

The vendor hired to provide lunches for sites chosen by Youth In Government was A.M. P.M. Food Service (409, 410, 635). It supplied three sponsors in addition to Youth In Government (635).

Organization of Youth In Government

USDA "expected" Youth In Government to have executive, supervisory and monitoring positions (557). However, the USDA did not specify any job title or job description for any Youth In Government employee (922). Moreover, USDA regulations did

not limit Youth In Government as to the number of persons that it could hire (557), nor did they specify the job to be performed by any employee or require any of them to work any specific length of time (88, 558).

USDA regulations did not prescribe the salary for any of the positions established by Youth In Government (558). No pay scales, hourly rates or weekly rates were set by the USDA for any employees of sponsoring organizations such as Youth In Government (108). Indeed, the USDA had nothing to do with the fixing of the salaries paid by Youth In Government (561).

Miss Horowitz' Employment

Mr. Buigues knew Miss Horowitz when they were fellow workers at the Office of Economic Opportunity in 1971 (1008). He met her again at a social function a few months prior to the start of the Summer Lunch Program (995). She told him at that time that she was looking for a job (995). While Mr. Buigues did not then promise that he would employ her at Youth In Government (1055), Miss Horowitz was later hired on Mr. Buigues' recommendation (869).

Miss Horowitz' Job

Mr. Puig, Director of the Summer Lunch Program of Youth In Government in 1975, testified that Miss Horowitz was employed as a "monitor, vendor, trouble-shooter" (802).

He testified that Miss Horowitz' job was to "increase, decrease, to make sure the lunches were going out from the vendor"

(803). He said Miss Horowitz "was at the vendor's to report increases, decreases, to make sure the lunches got out to the sites and to make sure the vendor was performing its job" (850). Her job was to regulate the number of lunches produced by the vendor depending upon the number of sites to be served, to correct any deficiencies in the food and to see that the lunches arrived on time (724). She was also to insure that the food was properly packed (725).

Miss Horowitz was required to be at the vendor from 5:30 to 6:00 in the morning until 8:30 to 9:00 in the morning (874). While Mr. Buigues did not have detailed knowledge of what Miss Horowitz did nor the hours she put in (1034, 1035), he testified that the monitor's task required 2-1/2 to 4 hours of work daily (1000). Mr. Puig advised her that this was all the time she was required to work (874). She could come and go as she pleased if her job was completed (875). Furthermore, she was not prohibited from taking any other job during the period when she worked for Youth In Government (924).

Miss Horowitz' Performance

Paul Massielli, Production Manager of A.M. P.M. Food Service, the vendor supplying Youth In Government, testified that Susan Horowitz was assigned by Youth In Government to the A.M. P.M. Food Service plant in the summer of 1975 (637). Mr. Massielli saw Miss Horowitz "just about every morning" at his plant during July and August 1975 (637). He said, of all the sponsors serviced by A.M. P.M., Miss Horowitz was "the one

with the most complaints" (637); "...[S]he really went to extremes. She wanted her trucks out first every morning..." (637). Miss Horowitz was not required to report to the Youth In Government storefront office or the distribution sites after she finished her work at the vendor's plant (776). Accordingly, Government witnesses who were employed as monitors at the sites where the lunches were served did not see her.

Miss Nieves, a Youth In Government employee, testified that she passed to Miss Horowitz complaints concerning the vendor's performance (685, 686). And corrections were made by the vendor (686). Even the government's witness testified that complaints concerning the lunches produced by the vendors were resolved (218 Gilcrist), (262 Rodriquez).

When Mr. Puig was asked whether Miss Horowitz performed her job, he answered, "Yes." (803).

Miss Horowitz' Salary

Based upon its application for 63 sites, Youth In Government projected that it would serve 15,000 lunches daily for which it would be paid approximately \$900 a day for administrative costs (789, 790). In its budget, Youth In Government indicated that it would hire two "Supervisors" at \$175 a week (250). Miss Horowitz was to be one (225). However, the budget of Youth In Government was cut back because the USDA rejected some of its proposed sites (170). In addition, the funding provided by the USDA for Youth In Government was reduced by 15% to 20% in late June or early July, 1975 as a result of an overall

Summer Lunch Program funding reduction in New York City (556, 595). As a result, although she had been hired to work as a "Supervisor" at \$175 a week, Miss Horowitz was employed as a "Monitor" at \$110 a week. Youth In Government paid Susan Horowitz a gross salary of \$880, \$110 a week for her 8 weeks work (95).

Miss Horowitz' Other Job

At about the same time Miss Horowitz applied for a job with Youth In Government, she applied for a professional position at Arawak Consulting Corporation, a firm providing consulting services for small businesses, individuals and governmental agencies (Exhibit 17, 461, 459, 460). Miss Horowitz' application described her qualifications including a master's degree in social work from Columbia University (479).

Miss Horowitz was employed starting July 7, 1975 by Arawak as a staff associate to do field research and to develop programs to reassimilate ex-offenders back into society (460, 472, 480). She was to be paid a salary of \$12,000 a year (461).

As Miss Horowitz was hired on a professional level at Arawak she was not required to arrive at a specific hour (477, 478). Her job was not a 9 to 5 job (484), although during her first week with Arawak she arrived at about 9:00a.m. (Exhibit 16). Her duties and functions required flexible hours (484).

The USDA's Requirements For Hours Of Work

The USDA did not have any requirement concerning the

number of hours an employee of a Summer Lunch Program sponsor must work. Mr. Scott Lee Spencer, an auditor with the USDA Office of Audit, testified (88, 89):

"Q Is there any regulation of the United States Department of Agriculture that requires particular or specific work hours in a sponsoring organization participating in the Summer Lunch Program in 1975?

A If the cost of these is to be claimed, there must be supporting information for it, if I understand your question correctly.

Q Let me put the question again.

THE COURT: He is asking you whether anybody is required to work any period of time, and you are answering him on a different level. You are saying to him: If he is making a claim for the services, then you check it out.

Is that what you are saying?

THE WITNESS: This is correct.

A As far as length of time requirement, no. He can work any number of hours.

Q If one were assigned as a site monitor in the employ of a sponsoring organization in the Summer Youth Program of 1975 at a weekly salary of \$110 and one can perform that function well and properly within three hours, you would have no objection to that, would you, in

auditing the claim?

A If this is what was claimed, no, sir.

Q Upon the claim, is there any provision to delineate or state the number of hours or days worked, sir?

A No, sir."

* * *

"Q Is there any regulations of the U.S. Department of Agriculture for the year 1975 that stated that a certain number of hours must be spent by each employee at a certain rate for a certain job title?

A No." (92, 93, 108).

In addition, the Government witnesses who were Youth In Government employees testified that they did not work 7 hours a day.

Mr. Gilcrist worked from approximately 10 to 4 (118). Miss Pilar Pacheco, another Youth In Government employee, worked from 9:00 to 1:00 each day (660). Mr. Rogers from 9 to 2 (284). Miss Janet Nieves, who was employed by Youth In Government for the month of August, testified that Government witnesses only worked two to three hours a day during that month (679).

Susan Horowitz' Character

Miss Horowitz presented five character witnesses.

Joseph H. Schwab, a lawyer, and Abraham Janowitz, an elementary school principal, both testified that Miss Horowitz had a reputation for honesty and integrity and was a forthright person (838, 841).

Her third character witness, Carleton Irish, Director of the Office of School Safety for the New York City Board of Education (952), testified he hired Miss Horowitz to be a member of the New York City Mayor's Office of Special Community Problems and a member of the Mayor's Education Task Force (952). She worked in that position for over two years until the cutback of City employees caused by the recent fiscal crisis (953). Her work performance was of the highest order (954). She had very little field supervision and worked independently (954).

A fourth character witness was called on behalf of Miss Horowitz, Sam Hartenberg, Professor of Philosophy, City University, York College (956). He testified Miss Horowitz was a good and serious student and played a responsible role as a student leader (958).

A fifth character witness called for Miss Horowitz, William Daly of the Equal Employment Opportunity Commission (961), testified that Miss Horowitz was an investigator with the Equal Employment Opportunity Commission (962). He testified that Miss Horowitz was very industrious, intelligent and a good worker who was also very punctual (963).

Miss Horowitz' Involvement With
Filing of False Claims

Mr. Puig testified that Miss Horowitz had nothing to

do with preparation of any reports, forms, payroll records or invoices for reimbursement in connection with the Summer Lunch Program of 1975 of Youth In Government (849).

Miss Anes, Youth In Government's bookkeeper, entered seven hours in Youth In Government's books for each worker for each day in spite of the number of hours they worked (738). She testified that she did so upon the advice of Pedro Rodriguez, another Youth In Government employee and a government witness (714). Miss Anes did not check to see what Miss Horowitz was to do at the vendor (775). Furthermore, she was not required to, and did not, file any reports with Youth In Government (727, 776). The performance of her job was determined by whether complaints concerning the vendor were resolved. The USDA coordinator of the Summer Food Program never inquired as to who at Youth In Government took care of the complaints of vendor discrepancies (605).

Mr. Puig testified that Miss Horowitz did not perform anything in connection with the audit of Youth In Government or any functions of Youth In Government after August 29, 1975 (924).

The Evidence of Conspiracy

A Mr. Barkan, who was not called as a witness, but was described as a friend of Miss Horowitz, was Mr. Buigues' boss at the Office of Civil Rights, Department of Health, Education and Welfare (995). However, Mr. Buigues testified that Mr. Barkan did not urge him to employ Miss Horowitz or recommend her to him (996). The only evidence linking him with

this case is Mr. Buigues' testimony that on April 27, 1975 and on January 19, 1976, Mr. Buigues received salary increases which Mr. Barkan approved (1011-1013). To the contrary, however, Mr. Buigues testified that salary increases at his level in the federal government were obtained through competitive examinations (1012).

No evidence was presented showing that Miss Horowitz communicated with anyone connected with Youth In Government concerning her obtaining a job other than her telling Mr. Buigues a few months before July, 1975 that she needed a job.

Questions Presented

1. Was the evidence presented at trial sufficient to convict appellant Susan Horowitz?

2. Was the evidence presented at trial sufficient to show that Susan Horowitz knew and intended that any statement made by her would be used as a basis for the reimbursement of her employer under a false claim?

ARGUMENT

POINT I

The Evidence Was Insufficient To Convict Miss Horowitz

Miss Horowitz was charged with three counts. Count one alleged conspiracy to file false claims (18 U.S.C. §§ 371, 287). Counts two and three charged the filing of false claims and aiding and abetting in the filing of false claims (18 U.S.C. §§ 287, 2).

No evidence was adduced at trial showing that Miss Horowitz made or presented a claim with the Government concerning the 1975 Summer Lunch Program. Indeed, the evidence presented by both the government and defense witnesses was to the effect that she did not prepare, sign, file or ever see the claims. Accordingly, as §287 prohibits only the making or presenting of a false claim, she cannot be convicted of a violation of that section. U.S. v. Catena, 500 F.2d 1319 (3rd Cir., 1974). The question, then, is whether the evidence is sufficient to sustain a conviction of conspiracy to file, or aiding and abetting the filing of, false claims.

The reported cases involving a conspiracy to, and an aiding and abetting of, the filing of a false claim in violation of 18 U.S.C. 287 show an obvious conscious involvement on the part of the person charged in inducing another to file a false claim. A "personal intent" is required Ebeling v. United States,

248 F.2d 429, 435, cert. denied, sub nom., Emerling v. United States, 355 U.S. 907, 78 S. Ct. 334, 2 L. Ed. 2d 261 (1957).

The court in Ebeling, a false statement (18 U.S.C. §1001) and conspiracy (18 U.S.C. §371) case, summarized the evidence examined by the Court in determining the guilt of an employee of a corporation which had filed a false statement with the federal government (248 F.2d at 435):

"[W]e are unable to see any legal reason why an employee would not be guilty of an offense under the statute, if his work consisted in performing tasks under a defense, cost plus contract between his employer and the government; if he had knowledge of the existence of the contract and of the fact that the work which he was doing was in performance of it; if he knew that the wages paid him were to be reimbursed as such to his employer by the government; and if he wilfully engaged in turning in a false, written statement of the hours worked by him, for the purpose of receiving wages not due him, and with the accompanying intent in these circumstances that the statement was to be accepted and used as a basis for the obtaining of reimbursement by his employer from the government, under the statutory power in a department or agency thereof to examine the legitimacy and correctness of the charges involved and with the right to rely upon the employee's statement as a component in the matter."

While the evidence considered in Ebeling is not stated to be exclusive, it includes the same factors considered in recent cases such as Catena, supra, and a case decided by this Court, United States v. Candella, 487 F.2d 1223 (2nd Cir., 1973) cert. denied 415 U.S. 977, 94 S. Ct. 1563, 39 L. Ed. 2d 872 (1974). Furthermore, those factors are relevant to

the conspiracy alleged in the case against Miss Horowitz; that she conspired to file a false claim against the USDA and thereby defraud the United States by causing it to reimburse Youth In Government for work she had not performed. The essential item of proof in this conspiracy is Miss Horowitz' "personal intent."

The evidence against Miss Horowitz taken in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942) does not meet the parameters set forth in Ebeling and shows a total lack of "personal intent."

First, Miss Horowitz was not hired to perform tasks under a cost plus contract. Youth In Government was to be compensated up to \$.06 a lunch it distributed for administrative costs. To the extent its costs exceeded that amount, it would not be compensated. To the extent its costs were short of that amount, it would be, provided its costs were reasonable. But what was applied for was to be decided by Youth In Government as was what would be paid its employees. Miss Horowitz had no power to affect what she was paid or what reimbursement would be sought from the federal government.

Second, there is no evidence that Miss Horowitz had knowledge of the contract between Youth In Government and the USDA or, if it can be inferred that she had a general knowledge that federal funding was involved, that she knew the terms of it. To the extent she can be generally charged with knowledge of federal funding, it can be inferred that her work was in per-

formance of it. These inferences are speculative, however, as no evidence was introduced indicating that she discussed the general nature of the project with anyone or that anyone explained to her what was required under Youth In Government's contract with the USDA.

Third, there is also no evidence that Miss Horowitz knew that the wages paid to her were to be reimbursed, as such, to Youth In Government by the USDA. The evidence, in fact, is to the contrary. It shows that the USDA was not bound to pay Youth In Government what Youth In Government paid her and moreover did not pay Youth In Government anything during the period when she was employed.

Fourth, there is no evidence that Miss Horowitz wilfully turned in a false written statement of the hours worked by her for the purpose of receiving wages not due her. There is no evidence that she was requested to or did make any statement whatsoever about the number of hours she worked. And this is where the government's conspiracy theory breaks down with respect to Miss Horowitz. The evidence clearly shows that she was expected to perform a function regardless of the number of hours it took. There is no evidence that she was ever told that she was required to work seven hours. And it is obvious that her job could not take that long. The trucks delivering the lunches were required to leave the A.M. P.M. plant between 8 and 11 each morning. If she was going to make any corrections, she had to do it before then. The government's contention that she did not report to

Youth In Government's storefront office after leaving the vendor does not support its case. She was not required to do so. And if she had there was nothing for her to do there.

The evidence also clearly shows that she was not paid an hourly rate. Her weekly salary was set by Youth In Government. That it was not tied to the number of hours she worked is obvious from the fact that it was arbitrarily reduced.

The government's case is based practically entirely upon the fact that Miss Horowitz had a second job during the time she worked with Youth In Government. It argues that she could not have worked a full day at both jobs; and did not intend to as she filed an application at Youth In Government after she filed one with Arawak. These arguments do not support her conviction. It is no evidence of fraudulent intent for an out of work person to file two job applications. Moreover, she was not hired at Arawak until after a week after she started work with Youth In Government. And, as far as the evidence shows her work there did not conflict with the performance of her function at Youth In Government. There is no evidence that she did not satisfactorily perform both functions. The testimony of one government witness that, in one instance, a correction of a problem at A.M. P.M. took longer than he thought it should have, does not prove that it was the fault of Miss Horowitz or that she was not there. And yet that is the only item of evidence that

supports the government's case.

Fifth, as Miss Horowitz made no statement concerning the number of hours she worked, she could not have had an intent that the statement would be used as a basis for obtaining reimbursement from the government. Her application for employment at Youth In Government, although introduced in evidence, was not filed with the government or used in any way as a basis for reimbursement.

In summary, the evidence concerning Miss Horowitz shows that she was hired to perform certain tasks and, by the admission of both government and defense witnesses, performed them. She was not required to work a specific number of hours either by Youth In Government or the USDA. She was not required to, and did not, file any reports specifying the hours she worked, when she arrived or when she left. And, she was paid a reduced salary of \$110 a week, \$15 above the welfare level. Such evidence is entirely consistent with the innocent performance of a necessary function at a minimal salary. In fact, it does not rise to the level of that against the co-conspirators in Ebeling (248 F.2d at 432) who, although they prepared false cover-up documents, were "not indicted since they had only done what they as employees had been directed to do."

Indeed, the evidence goes even further in establishing her innocence. It shows without contradiction that she worked

from two to three hours a day, practically every day. It also shows that had the USDA known that (and there is no evidence that Miss Horowitz tried to keep it from them, or knew that they did not know it), it most likely would not have questioned the payment of \$110 a week to her. A payment of \$7 to \$11 an hour. For the USDA employee charged with the duty of investigating such matters testified that they would have only questioned a payment to Miss Horowitz of \$110 a week for three hours work. He was unwilling to state that they would have disallowed it. With respect to Miss Horowitz, this case represents an extension of Sections 287, 371 and 2 to impose criminal liability for what is at best an arguable civil action to recover excess profits. Even the Assistant United States Attorney recognized that fact when he argued in his summation that "Even \$110 a week is more than what she deserved." (1116)

POINT II

There Is No Evidence That Miss Horowitz
Made Any Claim That Was Intended
To Be Used To Obtain Reimbursement From
The Government

In Lowe v. United States, 141 F.2d 1005 (5th Cir. 1944) the court reversed a conviction for violation of 18 U.S.C. §287 and §2 on the ground that a shipyard worker, who falsely reported to his private employer the number of hours he had worked, was not aware that the time he turned in would be the basis of a request for reimbursement from the government by his employer.

While that case has been distinguished by others, most notably, by the Eighth Circuit in Ebeling v. United States, supra, by this Court in United States v. Candella, supra, and the Fifth Circuit in United States v. Beasley, 550 F.2d 261 (5th Cir. 1977), it has not been overruled. And it should not be. The premise of Lowe is that before a person can be convicted of filing or aiding and abetting in the filing of a false claim with the United States, he should be found to have made a false statement, knowing it to be false, and knowing that it will be used as a basis for a claim against the government. In essence, the false statement must be intended to have an affect upon the federal government in order for there to be a federal crime

regardless whether the claim may constitute a state crime or be a basis for civil liability.

But, the evidence against Susan Horowitz is not as strong as that alleged in the indictment of the defendant in Lowe. There is no evidence, taking it all in the light most favorable to the government that she: (1) was required to or did report the hours she worked to Youth in Government; (2) knew a claim was to be filed by Youth In Government with the USDA; or (3) knew the number of hours she worked had anything to do with the claim to be filed by Youth In Government. In fact, the evidence is to the contrary. It shows that she was initially hired to be a supervisor at \$175 a week and then employed as a monitor at \$110 a week, a change in job title and a reduction in pay made unilaterally by Youth In Government with no reference to the number of hours she was to work or to report. And it shows that she performed her job in a manner similar to the shipyard worker in Lowe - "under a private contract with a private corporation."

The additional charge of conspiracy is not any more supported by the evidence against her than that of aiding and abetting. The same degree of knowledge and criminal intent is required. United States v. Feola, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975)

The evidence in Ebeling v. United States, United States

v. Candella and United States v. Beasley shows direct knowledge by the defendants in each of those cases that their false statement would have an effect upon the federal government. In Ebeling, the court stated that the "personal intent" of the defendants to include false statements they had written as a part of the fraudulent cost statement submitted to the government was not one of "probative weakness." (248 F.2d at 435). Here it is. Not only does the evidence fail to show that Miss Horowitz wrote or orally made a claim as to the hours she worked, it does not show that she even knew that she was listed on Youth In Government forms as having worked seven hours a day or that such forms were being submitted to the government.

United States v. Candella, a case also involving a charge of filing, and aiding and abetting in the filing, of false statements supports the government's case against Miss Horowitz even less than Ebeling. As this Court stated with regard to a false affidavit by the defendants in that case with the City of New York (487 F.2d at 1227):

"The case here is even stronger [than Ebeling] since the appellants were not only made aware of the nature and purpose of the affidavit, but were further advised that false statements would be violative of the United States Code."

In United States v. Beasley, a case involving conspiracy, the filing, and the aiding and abetting of the filing,

of false claims, the evidence showed not only the conscious filing of false claims by the defendants, but the preparation of false back-up reports to conceal those claims. The Court distinguished Lowe on the ground that, as the defendants in Candella knew the claims they filed with the City of New York would be passed on to the federal government, the defendants in Beasley knew that the State of Louisiana would rely upon the claims they filed for reimbursement from the federal government.

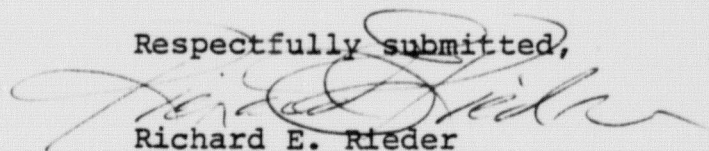
Although the Court in Beasley, also cites Catena, supra, for support, there was no question that Doctor Catena knew that the insurance companies with whom he filed his medicare claims would pass them on to the federal government.

On the contrary, here, like in Lowe, there is no evidence that Miss Horowitz made any oral or written statement upon which she knew a claim to be filed with the federal government would be based. Nor is there any evidence that any oral or written statement made by Miss Horowitz was relied upon by the USDA in reimbursing Youth In Government.

CONCLUSION

Appellant Susan Horowitz's conviction should be reversed.

Respectfully submitted,



Richard E. Rieder
Attorney for Appellant
Susan Horowitz

COMMUNICATIONS
 AUG 4 - 1977
 U.S. AIR FORCE
 SO. DIST. N.Y.
 ROBERT B. FISKE JR

